75-291

Supreme Court, U. S.
FILED
AUG 21 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
DOCKET NO. 75-291

HERBERT C. KLEIN,

Petitioner,

vs.

KENNETH ROBINSON, et al.,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO REVIEW A
JUDGMENT OF THE SUPREME
COURT OF NEW JERSEY

HERBERT C. KLEIN
Member of the New Jersey
Assembly, District 34
Pro Se
663 Main Avenue
Passaic, New Jersey 07055

(a) This petition for a writ of certiorari seeks to review a decision of the Supreme Court of New Jersey. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975).

(i) The judgment sought to be reviewed was entered May 23, 1975.

(ii) There was no rehearing and no order extending time to file petition for certiorari.

(iii) Jurisdiction is based upon 28 U.S.C.A. §1257(3).

(b) Questions Presented

(i) Where a State Legislature appropriates funds for local school aid and directs that such funds be disbursed to local school districts in accordance with a formula adopted by the Legislature, and where a court orders that such funds be expended in accordance with a different formula, does not such action by the Court constitute violation of the principle of separation of powers?

(ii) Does not such action by the Court constitute an encroachment upon the exclusive legislative power to appropriate funds?

(c) The case involves the following provision of the Constitution:

Article IV, Section IV

"The United States shall guarantee to every State in this Union a republican form of government. . ."

(d) Statement of the Case

Plaintiffs instituted this action to challenge the validity of the formula adopted by the New Jersey Legislature for providing State aid to local school districts. The State Supreme Court held that the Legislature formula was violative of the State Constitution and hence invalid. Robinson v. Cahill, 62 N.J.473 (1973). The Court ordered the Legislature to adopt a new formula. By the decision sought to be reviewed the Court has gone still further. It has directed that approximately $290,000,000 in State aid shall not be distributed to those school districts designated in the Legislative formula but rather that it shall be redistributed to other school districts in accordance with a totally different formula.

(e) Petitioner, a member of the General Assembly of New Jersey, intially appeared in this cause when he filed a brief with the Supreme Court of New Jersey on March 7, 1975. Such brief was filed pursuant to order of that Court permitting members of the Legislature to file briefs in the cause. Petitioner's

aforementioned brief contains the following proposition:

"Similarly, the power to prescribe the mode of providing an educational system is vested in the legislature and in no other branch."

(f) Copies of opinions are separately filed.

REASONS FOR GRANTING CERTIORARI

The Court below has ordered that approximately $290,000,000 appropriated by the Legislature of New Jersey as aid to education in local school districts should not be distributed in accordance with the statutory formula; instead, the Court ordered redistribution of these funds in accordance with a totally different formula. As a result, many school districts in the State will be deprived of State aid that had been appropriated by the Legislature while others will receive State funds in excess of Legislative appropriations.

Petitioner is a member of the Legislature and represents District 34

in the General Assembly of New Jersey. Five of the six municipalities in District 34 would be deprived of Legislatively appropriated State school aid as a result of the Court ordered redistribution. More than 70% of the residents of Petitioner's legislative district reside in the five adversely affected municipalities.

THE ORDER OF THE NEW JERSEY SUPREME COURT CONSTITUTES AN ENCROACHMENT UPON THE EXCLUSIVE POWER OF THE LEGISLATURE TO APPROPRIATE FUNDS.

"The United States shall guarantee to every State in this Union a republican form of government . . ." Constitution, Article IV; Sect. IV.

Inherent in that guaranty is that the basis powers reserved to the people through their representatives shall not be ursurped. Although the modern view recognizes that the branches of government may not be divided "into water tight compartments," the doctrine of separation of powers still remains fundamental to Anglo American Law and the republican form of government.

Where one branch transgresses on powers clearly reserved to another, the action cannot be countenanced. No clearer example of a power that is exclusively in the Legislative domain could be imagined, than the power to appropriate funds.

This concept was well articulated by the dissenting opinion in the Court below:

"More and more courts have come to recognize that where a practical necessity exists, a blending of powers will be countenanced, but only so long as checks and balances are present to guard against abuses." 339 A.2d at 217

"But what of the power that we are considering here? We assume it would not be disputed that the power of appropriating public funds is commonly understood to be a legislative function. If the Court undertakes to reallocate funds the ultimate disposition of which has been fixed by the Legislature pursuant to the exercise of its acknowledged power

of appropriation, how is this new-found power of the Court to be controlled? How can it be checked? We discern no way that this can be done. The power to appropriate is singularly and peculiarly the province of the Legislature. It is commonly thought of as an adjunct to the taxing power. If the courts are at liberty, for whatever reason, to reallocate appropriated funds in some particular case, why may not the courts do so in other cases as well? Who is to stay the judicial hand and what law is to guide its exercise? There are no discernible boundaries or limits beyond which the power might not be exerted provided only that the Court were made to feel that the exigency of the moment was sufficiently serious to justify the action. It seems to us that the exercise of such a power by the courts is indeed unchecked, and that it cannot be said to fall within any relaxation of the doctrine of the separation of powers that has thus far been countenanced. See

generally Gibbons, "The Inter-dependence of Legitimacy: An Introduction to the Meaning of Separation of Powers," 5 Seton Hall L.Rev. 435 (1974); Wright, "The Role of the Supreme Court In A Democratic Society - Judicial Activism or Restraint?," 54 Cornell L.Rev. 1 (1968)." 339 A.2d at 217-218

"We recognize that it is difficult to deal in terms of constitutional absolutes. Constitutional interpretation is a delicate, sensitive and flexible process. Yet we cannot at the present time foresee a state of affairs or set of circumstances which would justify this proposed encroachment upon the prerogative of another branch of government." Dissenting opinion of Mountain and Clifford, JJ. 339 A.2d at 219.

It would be pedestrian to elaborate at length the travails which brought this nation into existence. Suffice it to say that in no small part it was due to the fierce resentment of its inhabitants over taxation without

representation. The Declaration of Independence justified the dissolution of the political bonds between the colonies and Great Britain in part: "For imposing taxes upon us without our consent."

Despite the great passage of time, the fundamental truths recognized two hundred years ago are as vital today. Our founding fathers understood only too well that no power belongs so peculiarly in the hands of the people and their legislative representatives as the power to raise and to spend money. The decisions as to how much and in what manner government shall make its expenditures must in the last analysis be vested in the people, no

matter how wise or unwise those decisions may seem to the Executive or Judicial branches.

In San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973), the United States Supreme Court in reversing a three-judge panel which had found infirmities in the financing of the Texas school system held at 411 U.S. 1 58, 59, 36 L.Ed.2d 16, 57, 58, that:

> "The consideration and initiative of fundamental reforms with respect to state taxation and education are matters reserved for the legislative process of the various states, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is

> apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly, innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the law makers and from the democratic pressures of those who elect them."

The decision of the Court below, we submit, violates that fundamental principle of our republican form of government. By directing the redistribution of school funds, the Court below has directed that the State expend and appropriate money in a manner totally at odds with the expressed intent of the Legislature.

The decision to our knowledge is unique in our jurisprudence. It represents the first occasion in which a State Court has gone so far as to order the expenditure of funds in a manner different from that directed by the Legislature.

The Courts in almost every state have considered similar constitutional provisions concerning the financing of education in public schools. In reviewing the case law in the other states, it appears that no court has attempted to impose the extraordinary judicial remedies which the Governor and the plaintiffs now seek. Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Serrano v. Priest, 5 Cal.3d 584,

487 P.2d 1241, 96 Cal.Reporter 601 (1971); Blase v. State of Illinois, Sbarboro V. State of Illinois, 5 Ill.2d 94 (1973); Miller v. Nunnelley, 468 S.W.2d 298 (Ct.App. Ky. 1971); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); State ex rel. Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Spano v. Board of Education of Lake Land Central School District, 328 N.Y.S.2d 229 (1972); Burruss v. Wilkerson, 310 F.Supp. 572 (W.D. Va. 1969); Sweetwater County Planning Committee v. Hinkle, 491 P.2d 1234 (Wyo. 1971). Although several state courts have declared school financing systems unconstitutional, the remedy became effected by legislative revision and not judicial creation.

We respectfully submit that the importance of this question to the integrity of the republican form of government merits consideration by this Court.

(i) Copies of opinion will be submitted separately.

(j) The judgment is enclosed in the opinion.

Respectfully submitted,

HERBERT C. KLEIN
Member of the New Jersey
Assembly (District 34)
Pro Se

State of New Jersey:
:SS
County of Passaic :

I, Rose Ann Ferment, being duly sworn says:

1. I am a secretary employed in the office of Herbert C. Klein, a member of the New Jersey Assembly, District 34, pro se, petitioner.

2. On August 21, 1975, I served 3 copies of the foregoing petition for certiorari upon all of the parties required to be served by mailing 3 copies in duly addressed envelopes, with first class postage prepaid, as follows: Brendan T. Byrne, pro se, State House, Trenton, New Jersey; Lewis B. Kaden, Esq. 58 State Street, Perth Amboy, New Jersey; William F. Hyland, Atty. Gen., State House, Trenton, New Jersey; Warren, Goldberg & Berman, Esqs., 219 E. Hanover Street, Trenton, New Jersey; Borrus, Goldin & Foley, Esqs., 90 Paterson Street, New Brunswick, New Jersey; Ruvoldt & Ruvoldt, Esqs., 164 Ocean Avenue, Jersey City, New Jersey; William J. Bender, Esq., 5 Wendover Road, Montclair, New Jersey; Frank Askin, Esq., 180 University Avenue, Newark, New Jersey; William J. Zaino, Esq., 948 B. Village Drive East, North Brunswick, New Jersey;

Ruhlman & Butrym, Esqs., 2490 Pennington Road, Trenton, New Jersey; Andrew T. Berry Esq., 550 Broad Street, Newark, New Jersey; Bruce LaCarrubba, Esq., 17 High Street, Newton, New Jersey; Martin L. Greenberg, Senator, 100 Evergreen Place, East Orange, New Jersey; Anthony Scardino Jr., Senator, 485 Valley Brook Avenue, Lyndhurst, New Jersey; Thomas H. Kean, Assemblyman, 1 Elizabethtown Plaza, Elizabeth, New Jersey; George J. Otlowski Assemblyman, 717 Convey Boulevard, Perth Amboy, New Jersey; Alan J. Karcher, Assemblyman, 80 Main Street, Sayreville, New Jersey; Meyner, Landis & Verdon, Esqs. Gateway 1, Newark, New Jersey; Milton A. Buck, Esq., 73 Carlton Street, East Orange, New Jersey; Checki & Politan, Esqs., 201 Stuyvesant Avenue, Lyndhurst, New Jersey; Pickett & Jennings, Esqs., Gateway 1, Newark, New Jersey.

Rose Ann Ferment

Rose Ann Ferment

Sworn and subscribed to before me this 21st day of August, 1975.

Helen Rizzo

Helen Rizzo
A Notary Public of New Jersey
My commission expires 5/5/78